

Client Alert

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BAKER & MCKENZIE

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ASIC announces proposals to facilitate equity capital raising

ASIC has released a [Consultation Paper](#) that proposes a number of measures that are designed to assist listed companies and managed investment schemes (including A-REITs and infrastructure trusts) to raise capital in the equity markets, while at the same time broadening retail investors' access to fundraising opportunities.

ASIC proposes to implement these measures by issuing relief, in some cases by way of class order and in other cases on an individual basis.

Many aspects of ASIC's proposed relief will formalise the flexible approach already taken by ASIC to facilitate capital raisings in the current economic climate.

If implemented, these measures should provide welcome flexibility for ASX-listed companies and managed investment schemes in their capital raising endeavours as they weather the global financial crisis. In addition, we would expect these measures will make it easier for cornerstone investors to provide underwriting support to an issuer's capital raising activities.

ASIC is seeking comments/submissions by 30 March 2009. We intend to make a submission. Please contact us if there are any issues you would like us to bring to ASIC's attention.

Executive summary

The key aspects of ASIC's proposed policy changes are:

CAPITAL RAISING ACTIVITY	CHANGES
Rights Issues	Issuers may be able to obtain individual relief so that they can rely on the cleansing notice prospectus or product disclosure statement (PDS) exemption if trading has been suspended for more than five days.
	Class order relief to be given to extend the item 10 of section 611 takeover exemption for: <ul style="list-style-type: none">• rights issues involving a shortfall facility; and• accelerated rights issues.

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CAPITAL RAISING ACTIVITY	CHANGES
Dividend and distribution reinvestment plans (DRPs)	Class order relief to be given to extend the item 11 of section 611 takeover exemption to underwriters of underwritten DRPs.
Secondary sales of securities issued without a prospectus or PDS (e.g., under a placement)	Issuers may be able to obtain individual relief so that they can rely on the cleansing notice secondary trading exemption if trading has been suspended for more than five days.
Placements by listed managed investment schemes	Change to existing class order relief to remove restriction of a maximum discount to market price of 10% for placements.
Share and interest purchase plans	Amount that each investor can acquire without a prospectus or PDS being given in a 12 month period under existing class order relief to increase from \$5,000 to \$15,000.

Current market environment

ASIC has recognized that issuers' ability to access debt financing continues to remain restricted due to global market conditions, which is likely to result in an increase in capital raising activity in the equity markets. The relief proposed is intended to enhance market integrity and assist issuers in managing the effects of the global financial crisis. This includes the continuing scarcity in the supply of debt, which is creating particular difficulties in refinancing existing debt facilities as they fall due. Furthermore, lenders are requiring issuers to sell assets and / or raise new equity as they take an increasingly conservative approach to the issuer's leverage as part of any refinancing.

We have outlined the details of the proposals in the context of different forms of capital raising activity below, in addition to discussing ASIC's focus on disclosure in the conduct of capital raisings and the proposed increase in the threshold for share / interest purchase plans.

Rights issues

Disclosure relief where there has been suspension for more than 5 days

Under the *Corporations Act 2001* (Cth) (Corporations Act) listed entities may conduct a rights issue without giving a prospectus (section 708AA) or PDS (section 1012DAA), provided that they lodge a cleansing notice with the ASX and trading has not been suspended for more than 5 days in the preceding 12 months (or if the entity has been listed for less than 12 months, the period for which the entity has been listed). The cleansing notice provisions require issuers to disclose to the market information that would be required to be disclosed under the general prospectus or PDS content requirements and which has not already been disclosed to the market (due to exceptions in the ASX continuous disclosure rules).

While noting that the maximum suspension period of 5 days (which ASIC interprets as 5 "trading" days) is intended to ensure that there is a fully informed market and the securities are adequately priced, ASIC has indicated that it will be prepared to grant relief on a case-by-case basis to allow entities whose securities have been suspended for longer than 5 trading days (excluding trading halt periods) to undertake a rights issue without issuing a prospectus or PDS.

In deciding whether to grant relief, ASIC will consider:

- the length of, and reason for, the suspension; and
- the period of time that has elapsed, and announcements that have been made to the market, since the suspension.

Any issuer seeking relief would need to demonstrate to ASIC why they should be able to access the disclosure exemption and, generally speaking, the greater the length of the suspension, the greater the level of scrutiny ASIC will apply.

ASIC considers that the relief will allow more rights issues to be conducted without a prospectus or PDS, thereby giving retail investors the opportunity to participate and avoid having their interest diluted.

A number of listed entities have suspended trading in their securities as they have sought to deal with issues such as covenant breaches and the inability to refinance debt facilities by their maturity date. ASIC's willingness to consider relief where there has been suspension for more than five trading days is welcome, as in some cases in the current environment there will be a need for the listed entity to raise equity capital as quickly as possible to overcome the very problem that has caused the suspension.

Takeovers relief

Item 10 of section 611 of the Corporations Act provides an exemption from the takeover prohibition where a person (including an underwriter) acquires a relevant interest in more than 20% of a listed company, a company with more than 50 members or a listed managed investment scheme as a result of a pro rata rights issue in which all offers are on the same terms. The rationale for the exemption is that capital raising activity should not be inhibited by the takeover provisions in the context of a pro rata offer that gives all members an equal opportunity to participate.

In some cases, issuers will want to offer a shortfall facility for the rights issue, which enables existing members to access securities offered to, but not acquired by, other members. The statutory exemption covers acquisitions by an underwriter, but will not cover acquisitions under shortfall facilities because the shortfall offer may not be pro rata or may not be on the same terms as the initial offer.

The use of a shortfall facility benefits members who may wish to increase their holdings beyond their pro rata entitlement. Underwriters (including major security holders acting as underwriters or sub-underwriters) may also be more willing to underwrite a rights issue if there is a shortfall facility, as the shortfall facility may reduce the underwriter's exposure.

ASIC proposes to issue class order relief to listed companies and managed investment schemes to enable the 20% threshold to be exceeded in relation to the offer of the shortfall, subject to the following requirements:

- all members must be able to participate in the shortfall facility on a pro rata basis and on equal terms; and
- the issuer must give members adequate information about the terms of the facility and the potential effect on control it may have.

ASIC is also seeking comment as to whether unlisted companies with more than 50 members should benefit from this relief.

It is our view that ASIC will need to tailor the class order relief further if it is to be applicable for "accelerated rights issues". "Accelerated rights issues" are conducted in separate institutional and retail tranches, and require institutional investors to take up some or all of their entitlement within a short space of time before the retail offer opens. In such cases, there will probably be a need to treat institutional and retail investors as two separate pools for the purposes of determining their participation in the shortfall. This is because any shortfall in the institutional tranche will need to be offered to institutional investors during the institutional offer, as underwriters will be unwilling to remain exposed to any risk of a shortfall in the institutional tranche whilst the retail offer runs its course.

ASIC also proposes to grant class order relief to extend the exemption under item 10 of section 611 to acquisitions under accelerated rights issues that are covered by [ASIC Class Order \[CO 08/35\] Disclosure relief for rights issues](#). The exemption does not currently apply as the terms of the offers are different for institutional and retail tranches in accelerated rights issues, although ASIC has previously granted relief in such circumstances on a case-by-case basis.

It should be noted that the issuer must comply with section 615 of the Corporations Act in order for the exemption under item 10 of section 611 to apply to an acquisition above the relevant takeover threshold. Section 615 sets out how an issuer must deal with the securities or rights of foreign holders to whom an offer under a rights issue is not extended, and applies to both renounceable and non-renounceable rights issues.

We believe that ASIC should also consider whether to grant class order relief to issuers from having to comply with the requirements of section 615 in circumstances where the issuer:

- is conducting a non-renounceable rights issue; and
- has a small number of foreign holders (e.g. less than 5% of its register).

When issuers are carrying out a non-renounceable rights issue and they are forced to comply with section 615, foreign security holders effectively receive the benefit of renounceability when Australian resident holders do not. This is because a nominee approved by ASIC is required to stand in the market and attempt to dispose of the foreign holder's security entitlement and then remit the net sale proceeds to the foreign holder.

ASIC has recognised that its proposal has change of control implications and may increase the risk of unfair dilution. However, it proposes to rely on its ability to seek a declaration of unacceptable circumstances from the Takeovers Panel as a means to deal with any potential abuse of the proposed relief.

Dividend or distribution reinvestment plans (DRPs)

Currently item 11 of section 611 of the Corporations Act provides an exemption from the takeover prohibition where a person acquires a relevant interest in more than 20% of a listed company, an unlisted company with more than 50 members or a listed managed investment scheme as a result of acquisitions that take place under a DRP. However, it does not cover an acquisition made by an underwriter of a DRP.

ASIC expects that, in the current climate, issuers may rely more heavily on DRPs as a source of capital. ASIC considers that issuers may raise more capital through DRPs if underwriters can exceed the 20% threshold, which will give retail investors better access to equity issues that might otherwise take place through a placement. It will be particularly relevant if a major securityholder wishes to act as underwriter or sub-underwriter of the DRP.

ASIC is proposing class order relief extending the item 11 exemption to cover acquisitions by underwriters of DRPs. The relief would require the issuer to give adequate information to members about:

- key terms of the underwriting;
- the identity of any sub-underwriters; and
- any association between a controller or substantial shareholder and the underwriter or sub-underwriter.

As DRPs are another form of a pro-rata capital raising, this is an appropriate extension of the item 11 exemption, particularly as listed entities are seeking to bolster their balance sheets through a variety of means in the current environment.

ASIC proposes to rely on its ability to seek a declaration of unacceptable circumstances from the Takeovers Panel as a means to deal with any potential abuse of the proposed relief.

Secondary sales of securities issued without disclosure

Under the Corporations Act securities of a listed entity that were issued without disclosure (e.g., through a placement) may be on-sold without a prospectus (under section 708A) or PDS (section 1012DA) being given, provided that the issuer lodges a cleansing notice with the ASX and trading has not been suspended for more than 5 days in the preceding 12 months.

ASIC proposes that the case-by-case relief in relation to the maximum suspension period contemplated in the context of rights issues will also be available for the on-sale of securities that were issued without a prospectus or PDS being issued.

As noted earlier, ASIC's willingness to consider granting relief in such circumstances will be most welcome to some listed entities that need to raise funds quickly.

Placements of interests in listed managed investment schemes

Currently under [Class Order \[CO 05/26\] Constitutional provisions about the consideration to acquire interests](#) (Class Order 05/26) ASIC grants relief from the requirements of section 601GA(1)(a) of the Corporations Act so that interests in a listed managed investment scheme can be issued in certain circumstances at a discount determined by the issuer, rather than at the price set by the scheme constitution (such as a VWAP market price calculation).

However, the maximum discount to the market price permitted by Class Order 05/26 in the case of a placement is 10%. Listed companies are not subject to this restriction when setting the issue price for a placement. For issuers of stapled securities that consist of shares in companies and interests in managed investment schemes, the effect is that the issue price for a placement of stapled securities must represent no greater than a 10% discount to the market price.

ASIC notes in the Consultation Paper that responsible entities of some listed managed investment schemes have in recent times amended the schemes' constitutions so that the constitutions specifically provided an issue price for the placement (which issue price represented a discount to the market price that exceeded 10%). We are also aware of some cases in which the amendments, rather than providing for a specific price or a specific range of discount to market price, have provided for the issue price to be determined by means of a bookbuild or pre-launch cornerstone process (without any restriction on the level of discount to the market price).

In all cases that we are aware of, the constitutional amendments to facilitate deeply discounted placements have been made without obtaining member approval. In this respect, ASIC notes that some concerns have been expressed in the market that the requirement to obtain member approval for a constitutional amendment that adversely affect members' "rights" under section 601GC of the Corporations Act could have been infringed (although the issue has not been tested in the courts).

However, we note that many participants in the Australian market are of the view that, where members are only affected by an amendment in a commercial sense (for example, by diluting the value of their units), this cannot be said to adversely affect their "rights". If this view is in fact correct, then any amendment to specify a price in the constitution for a placement that represents a discount to the market price would not require member approval.

ASIC considers that, in volatile economic periods, a deeper level of discount than the current 10% restriction may be warranted and, despite a short-term dilution of members' interests, may be in the best interests of members overall where the scheme may urgently need a capital injection.

ASIC is proposing to vary Class Order 05/26 and remove the restriction of a maximum of 10% discount in respect of placements, which would give the responsible entity of a listed scheme the same flexibility to set the level of discount as listed companies currently have.

We note that in 2004 ASIC granted relief from section 601GC so that scheme constitutions could be amended without member approval in the context of the transition to the Australian equivalent of the International Financial Reporting Standards. We consider that it would be appropriate for ASIC to adopt a similar approach in this instance to allow the 10% maximum discount limit to be removed from scheme constitutions without member approval where necessary.

ASIC considers that investor protection can be maintained on the basis that:

- the responsible entity is required to act in the best interests of members under section 601FC(1)(d) of the Corporations Act;
- the market will efficiently and fairly price the interests that are to be issued; and
- ASIC has the ability to apply to the Takeovers Panel for a declaration of unacceptable circumstances if members' interests are unfairly diluted.

If implemented, this proposal will represent a significant departure from ASIC's long held policy position relating to section 601GA(1)(a) set out in [Regulatory Guide 134 Managed investments: Constitutions](#). However, the proposal is an acknowledgment that recent market practice has seen responsible entities side-step the 10% restriction where there has been an urgent need to raise funds.

ASIC focus on disclosure

ASIC has cautioned that issuers must ensure that they fully comply with the continuous disclosure and cleansing notice requirements, fully inform their investors, achieve fairness in pricing and availability of any capital raising offer and act in the best interests of their members.

ASIC is particularly concerned about price-sensitive information being leaked to some potential investors in breach of continuous disclosure and/or insider trading laws, especially when a listed entity is sounding out the market about a possible capital raising. Where a listed entity is sounding out prospective investors, ASIC believes that they must give confidentiality and "no-trade" undertakings (e.g., establish information barriers within their organisation). ASIC states that they intend to monitor the effectiveness of these information barriers around price sensitive information. ASIC also advocates:

- recording what confidential information has been disclosed to whom (including parties both within and outside the issuing entity); and
- making timely announcements that indicate whether a previous announcement is being updated and provide effective disclosure of possible implications.

ASIC's proposed relief may not be implemented or (if implemented) maintained in the event that market practices demonstrate that there is ongoing risk.

Share purchase plans and interest purchase plans

In late 2008 ASIC released [Consultation Paper 103 Review of share purchase plan threshold](#). Currently under Class Order [\[CO 02/831\] Share purchase plans](#) and [Class Order \[CO 02/832\] Interest purchase plans](#) an ASX-listed company or managed investment scheme can issue up to \$5,000 worth of shares or interests to each member in a 12 month period without a prospectus or PDS. ASIC is proposing to increase the \$5,000 threshold to \$15,000, provided that the issuer gives a cleansing notice to ASX as part of the offer.

The Consultation Paper focuses primarily on issuers of shares, but ASIC notes that it proposes to grant the same disclosure relief for ASX-listed schemes. We have spoken to ASIC and understand that, despite it not being mentioned in the Consultation Paper, ASIC is proposing to make corresponding amendments to Class Order 05/26 to increase the \$5,000 threshold to \$15,000.

Consultation closed on this earlier proposal on 13 February 2009. To date no indication has been given by ASIC as to when the final policy will be announced.

In our experience issuers are increasingly using share purchase plans and interest purchase plans as an adjunct to placements to offer retail investors the opportunity to invest on similar terms to institutional investors. We also note that recently ASIC has been prepared to give individual relief to a number of issuers that enables them to issue up to \$10,000 worth of shares or interests to each member under their purchase plans.

Additional comments

Many aspects of ASIC's proposed relief will formalise the flexible approach taken by ASIC (whether expressly or otherwise) to facilitate capital raisings in the current economic climate.

It is not, however, clear whether the proposed relief will be given on a permanent or only a temporary basis. If the policy rationale for ASIC's intervention lies in the impact of the global financial crisis, then it is uncertain whether ASIC would then seek to revoke the relief when financial markets recover.

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We envisage that, if the relief were to be implemented, issuers would become accustomed to making use of the relief and its associated additional flexibility. Consequently, we believe that if ASIC were to seek to discontinue the relief on a later date when market conditions were more robust, it would face a strong backlash from the market. In any event, the proposed changes appear to us to be consistent with the Federal Government's more long term aim of attracting investment into Australia's capital markets by promoting market efficiency and ensuring that retail investors are given the same opportunities to participate in capital raisings as institutional investors.

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